

RESPONSE TO ADVISORY ACTION

Appln. No. 10/713,444

Docket No. 442005-00108

REMARKS

Claims 1-17 and 21-22 are pending in the application. Claims 15 and 21-22 have been withdrawn from consideration as being drawn to non-elected species of the invention. Claims 1-14 and 16-17 stand rejected under 35 U.S.C. § 112 ¶2. Claims 1-4, 6-10, 12-14, and 16-17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 4,644,727 to Hanson et al. ("Hanson '727") in view of an examiner's proposed modification. Claims 1, 3, 5-6, 11, and 20 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,082,068 to Fisher ("Fisher '068").

Telephonic Interview of November 13, 2007 and amendments filed December 4, 2007

Claims 1-14 and 16-17 stand rejected under 35 U.S.C. § 112 ¶2 as being indefinite for failing to particularly point out and distinctly claim the subject matter which the Applicant regards as the invention. The Office alleges that the claims recite contradictory language, in that the receptacles are construed to be either at different heights or equally spaced apart heights from the bottom of the concrete form, with it being unclear as to how they could be both. Office Action mailed 9/4/2007 at p. 3.

In a telephone interview conducted 11/13/2007, this representative and the examiner discussed the current rejections under § 112 and reached agreement concerning a disputed construction of "different heights, the heights being equally spaced apart heights, from the bottom of the concrete form..." so that claims 1 and 6 were amended to shift the absolute phrase (set off within commas) after the language "from the bottom of the concrete form." Amendment After Final Action filed 12/4/2007. This agreement was memorialized in the examiner's interview summary which represented that "[if] presented in an after final amendment [the amendments] would be entered and would overcome the 112 rejection." Interview Summary mailed 11/29/2007. The examiner's current decision to deny entry of the proffered amendments as "raising new issues of at least 3 receptacle[s] at equally spaced heights and the receptacles positioned at different heights with respect to each other" contradicts the agreement

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reached in the aforesaid interview, and therefore and breaches the Office's duty to further prosecution through authoritative agreements at the time of an interview. MPEP § 713.05. The Applicants' have detrimentally relied upon this written agreement in forestalling the filing of a Notice of Appeal on or before December 4th, 2007, so that an appeal of the section 112 rejection must now be filed in combination with a two or even three month extension of time due solely to the Office's (in)action. We respectfully request that the Office sustain the agreement and written representation that it has made by entering the proffered amendments and withdrawing the finality of the prior Office Action mailed 9/4/2007.

Placement of the Absolute Phrase

We respectfully note that the amendments that were denied entry were offered as a compromise to speed prosecution of the application, and do not alter the substantive construction of the claims, so that the amended claims do not raise new issues not already present and argued in the Amendment After Non-Final Action filed 6/21/2007. The attached excerpts from *Modern English Structures: Form, Function, and Position* and *Understanding and Using Good Grammar: Reproducible Lessons, Exercises, and Tests* clearly establish that an absolute phrase may be embedded anywhere within a sentence, depending upon emphasis and variety, without modifying the meaning of the sentence. Therefore the issues requiring examination are identical to the issues that were present when the prior amendments were filed on 6/21/2007. Moreover, although examiners may suggest claim language to improve the clarity or precision of the language used, they should not reject claims or insist on their own preferences if the language used satisfies the statutory requirement. MPEP § 2173.02. Since the examiner has conceded that shifting the absolute phrase would satisfy her preferences, and the section 103 rejections were overcome by the remarks filed on 6/21/2007, no substantive basis for rejecting either the claims present prior to the December 4th amendments or the claims proffered in the December 4th amendments remain outstanding. Interview Summary mailed 11/29/2007 at p. 2 (indicating that "upon [initial] glance providing such remarks... appear to overcome the [§ 103] rejection, but that upon examination another rejection with the same art may be applied."). Therefore the

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finality of the Office Action mailed 9/4/2007 must be withdrawn.

Conclusion

In view of the foregoing amendments and remarks, we respectfully submit that the present claims are allowable over the art of record and pray for a prompt allowance. The Commissioner is authorized to charge any additional fees required or to credit any overpayment to Deposit Account No. 20-0809.

Respectfully submitted,

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